SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

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AMERICAN MEDICAL ALERT CORPORATION,

Plaintiff,

Index No: 655974/2016

-against-

Decision, Order and Judgment

EVANSTON INSURANCE COMPANY, MICHAEL G. KAISER, M.D., NEUROSURGICAL ASSOCIATES, P.C., CHRISTOPHER AHMAD, M.D., NEW YORK ORTHOPEDIC HOSPITAL ASSOCIATES, P.C., FARAH HAMEED, M.D., COLUMBIA DOCTORS, NEW YORK AND PRESBYTERIAN HOSPITAL, NEW YORK-PRESBYTERIAN, THE UNIVERSITY HOSPITAL OF COLUMBIA AND CORNELL, and PENNY LYNCH,

Defendants.

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Hon. Martin Shulman

In a discovery order issued on March 23, 2018, this court initially summarized the parties' core contentions in this declaratory judgment action:

> [P]laintiff-insured American Medical Alert Corp. ("plaintiff" or "AMAC") seeks a determination requiring its defendant-insurer Evanston Insurance Company ("Evanston" or "insurer") to defend and indemnify plaintiff in connection with an underlying medical malpractice action captioned *Penny Lynch v Michael G Kaiser, MD*, Index No. 805410/2013 in New York Supreme Court, New York County ("Lynch Action").
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> Evanston's renewal professional liability policy for AMAC covered the period July 2, 2015 to July 2, 2016 (the "Policy"). In November 2015, AMAC notified Evanston of the pending Lynch Action to which it was then not a party. Between November 2015 and April 2016, Evanston, among other actions, retained New York coverage counsel to participate in its ongoing evaluation to decide whether to continue or deny coverage if AMAC ever became embroiled in the Lynch Action as a third-party

defendant[1] and defend Evanston if AMAC decided to sue insurer in any future coverage litigation. On April 27, 2016, Evanston formally notified plaintiff it was declining coverage because AMAC failed to notify insurer that a claim might be made against plaintiff prior to the effective date of the Policy. Within a year after notifying Evanston of the Lynch Action, AMAC filed this declaratory judgment action against insurer to enforce the terms and conditions of the Policy, *viz.*, reinstate its coverage for a defense/indemnification in the 3rd Party Action.

In the 3rd Party Action, *inter alia,* seeking contractual indemnification, defendants/third party plaintiffs had moved for summary judgment based on AMAC's admissions of negligence. This motion was denied.[2]

With discovery completed, AMAC now moves for summary judgment declaring Evanston is contractually obligated to defend and indemnify plaintiff in the 3rd Party Action. Evanston cross-moves for summary judgment declaring it has no contractual duty to do so. Both the motion and cross-motion are consolidated for disposition.

A key Policy provision that is the subject of this dispute is the "Professional Liability Coverage Part" which states, in relevant part:

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[1] "This actually occurred (*see Michael G. Kaiser v American Medical Alert Corp. d/b/a H-Link On Call*, Index No. 805410/2013 filed on June 9, 2016 in New York Supreme Court, New York County)("3rd Party Action"). In the 3rd Party Action, defendants/third-party plaintiffs essentially allege AMAC, via its telephone based communication services, negligently failed to timely notify the former of emergent calls plaintiff, Penny Lynch, made resulting in her claimed injuries in the Lynch Action."

[2] Plaintiff, Penny Lynch, in the underlying Lynch Action had been desperately trying to call Dr. Kaiser, one of the defendants/third party plaintiffs, from the evening of November 21, 2012 through November 23, 2012. Notwithstanding Dr. Kaiser's January 2012 instructions to AMAC to text telephone messages to his cell phone rather than to his discontinued pager, AMAC picked up Ms. Lynch's calls and took her messages, but erroneously forwarded her emergent messages to Dr. Kaiser's outdated pager number. AMAC sent a November 24, 2012 email acknowledging its negligent call-services errors (Exhibit K to AMAC's Motion). Despite AMAC's admissions of negligence, this court concluded defendants/third party plaintiffs' entitlement to summary judgment was premature on the then undeveloped record, especially absent any evidence of causation, i.e., directly linking insurer's negligent message delays as a cause of Ms. Lynch's ultimate post-discectomy injuries.

> The Company [Evanston] shall pay on behalf of the Insured [AMAC] all sums . . . which the Insured shall become legally obligated to pay as Damages as a result of a Claim first made against the Insured during the Policy Period . . . by reason of:
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> 1. a Wrongful Act; or
> 2. a Personal Injury;
>
> in the performance of Professional Services rendered . . . Provided:
>
> * * * * *
>
> b. prior to the effective date of this [P]olicy the Insured had no knowledge of such Wrongful Act or Personal Injury or any fact, circumstance, situation or incident which may have led a reasonable person in the Insured's position to conclude that a Claim was likely.

The smoking gun for Evanston's ultimate disclaimer of coverage under the Policy is an email Nichelle Davidson, AMAC's customer service department manager, sent to Dr. Kaiser on November 24, 2012 ("Nov 24th email")(Exhibit K to AMAC's Motion), which offered explanations for its communication errors and an apology: "Again, I am sorry for how we handled your messages and I understand that our errors caused a serious delay in Ms. Lynch receiving the patient care she needed."

In seeking summary judgment, AMAC essentially contends that until it received a tender letter from Dr. Kaiser's counsel on November 24, 2015 (Exhibit G to AMAC's Motion) demanding it defend and indemnify defendants/third-party plaintiffs in the underlying Lynch Action, a reasonable person in plaintiff's position, without prior, sufficient knowledge of certain facts, would have been unable to form a subjective belief that a professional liability claim against AMAC was likely during the then ensuing 2012-2015 period. AMAC further contends that Ms. Davidson's apology, without more, neither infers she possessed objective knowledge that Ms. Lynch's injuries were

causally linked to AMAC's mis-directed calls, nor was intended to constitute an admission "of liability, particularly in the customer service context, where AMAC was attempting to keep Dr. Kaiser as a customer . . ." (Mueller Aff in Support of AMAC's Motion at ¶70). Finally, AMAC argues that Evanston's belated, newfound basis to disclaim coverage due to a contractual liability exclusion in the Policy, as set forth in its May 18, 2018 letter (Exhibit J to AMAC's Motion), is untimely due to the lapse in time after Evanston's initial April 2016 disclaimer (*see* Insurance Law §3420[d][2]).

In opposition to plaintiff's motion and in support of its cross-motion, Evanston argues these points:

- Prior to the inception date of the Policy, AMAC breached the "Insuring Agreement" provision of the Policy by having actual knowledge that it could potentially have liability exposure for its call center operators' negligent after-hours, call answering services, and under a two-pronged, subjective/objective test, the Nov 24th email indisputably evidenced a prior knowledge condition[3] justifying Evanston's eventual disclaimer under the Policy as a matter of law;

- That is to say, AMAC, via its employees, subjectively believed its misdirected message calls to Dr. Kaiser (between November 22, 2012 through November 24, 2012, Ms. Lynch, or someone on her behalf, made five emergency calls to Dr. Kaiser about her worsening post-surgery, neurological symptoms) may have caused serious delays in the care and treatment of Ms. Lynch even absent a subjective belief it could be sued for its professional negligence;

- A reasonable person such as AMAC's customer service department manager, fully cognizant of the facts and

[3] According to Evanston, this critical piece of evidence proved: "(1) errors were made in connection with transmitting Ms. Lynch's messages to Dr. Kaiser; (2) AMAC failed to follow Dr. Kaiser's instructions [to forward any patient's phone message to his cell phone rather than to his no-longer-in-use pager]; (3) AMAC did not timely deliver messages; and (4) AMAC did not meet its standards in providing [after-hours, call answering] services to their clients . . ." (bracketed matter added)(Insurer's Memorandum of Law in Support of Cross Motion at p.11).

circumstances of its misdirected message calls to Dr. Kaiser, might objectively expect such facts to trigger a likely claim;

- Under the foregoing two-pronged test, AMAC, having knowledge that its negligent professional services to Dr. Kaiser could likely subject it to future litigation, was not required to have known that its professionally negligent services causally contributed to Ms. Lynch's injuries eventually made known in the underlying Lynch Action, nor did it require the commencement of the 3rd Party Action against AMAC before the Policy's effective date;

- On a separate basis, AMAC was fully aware its negligent call answering services could trigger a claim against it at the time plaintiff submitted its signed 2015 application to insurer for coverage under the Policy, and its failure to disclose the facts and circumstances involving plaintiff, Ms. Lynch and Dr. Kaiser in 2012 when it filed its application and made its claim for coverage under the Policy contractually justifies its claim exclusion; and

- Finally, as the 3rd Party Action makes clear, AMAC's call answering services contract with the defendants/third-party plaintiffs expressly permits the latter to seek contractual indemnification from AMAC in the underlying Lynch Action which, in turn, triggered the contractual liability exclusion[4] under Exclusion A of the Policy, and Evanston's 2018 disclaimer on this basis is timely (Insurance Law 3420[d][2] is inapplicable as no claim has been made against AMAC for "death or bodily injury" which would have required Evanston to disclaim coverage for same "as soon as reasonably possible . . .");

In reply, AMAC contends Evanston has no grounds to disclaim coverage under the ambiguous "prior knowledge condition" provision of the Policy as it has not satisfied either prong of the subjective/objective test, to wit, the only facts AMAC was aware of prior to signing Evanston's application in July 2015 were that: (1) its operators received

[4] As a result of a settlement between Ms. Lynch and defendants/third-party plaintiffs, the latter's claims against AMAC for common law indemnification and contribution were extinguished leaving only a claim against AMAC for contractual indemnification. Because defendants/third-party plaintiffs' claim against AMAC is now based on and arises out of the former's liability (to Ms. Lynch) assumed by plaintiff under a contract, Evanston argues that there can be no coverage for same under the contractual liability exclusion provision of the Policy.

five calls from persons involved with Ms. Lynch which were routed to Dr. Kaiser's discontinued pager; (2) some of Ms. Lynch's symptoms were conveyed including pain, but none were of an emergent nature; (3) Dr. Kaiser called AMAC on November 23, 2012 to learn why he did not get various calls regarding Ms. Lynch and advised plaintiff that Ms. Lynch did suffer a worsening neurological condition; and (4) Dr. Kaiser then received the Nov 24th email apology simply acknowledging AMAC's mistakes in misdirecting the Lynch telephone messages to his discontinued pager rather than to his cell phone which caused a serious delay in Ms. Lynch receiving appropriate care.

Against this factual backdrop as well as the ensuing three year silence until 2015, when defendants/third-party plaintiffs' attorneys demanded plaintiff provide defense costs and indemnification in the Lynch Action, AMAC contends it had no knowledge of the true scope of Ms. Lynch's actual medical condition when those five calls were made and had no actual or constructive notice that either Ms. Lynch or defendants/third-party plaintiffs had any reason to believe AMAC was responsible for her then medical condition to maintain any subjective belief that a claim would be likely. Under the objective test, AMAC further points out the nature of the "messages AMAC was given, the silence after the [Nov 24th] email, the failure of any indication that anyone was seeking damages from anyone, the lack of any medical information, and the passage of two and a half years until the [P]olicy application, there was no way any reasonable person would believe a claim was contemplated." (Mueller Reply Aff at ¶21). AMAC's reply highlights that Evanston never initially viewed the Nov 24th email as a bar to coverage under the Policy (see Exhibit O to AMAC's Summary Judgment Motion) until a new adjuster came on the scene, realized there could be a substantial

damage claim, and only then did Evanston seek to disclaim coverage due to perceived breaches of certain Policy conditions and/or exclusions.

Addressing the claimed omissions in AMAC's application for insurance coverage, AMAC advises that its failure to report the facts underlying its Nov 24th email to its prior insurance carrier is proof that plaintiff lacked a subjective belief/objective reasonable knowledge to form any belief that a future claim was on the horizon. However, when defendants/third-party plaintiffs made a written demand that AMAC provide defense costs and indemnification, plaintiff immediately reported this claim to Evanston.

Evanston's reply addresses a number of points AMAC raised in opposition to its cross-motion. First, AMAC misinterprets and conflates the unambiguous prior knowledge condition in the Insuring Agreement portion of the Policy to require an insured to report each and every mistake as a Wrongful Act and that any error, no matter how minor, would potentially trigger a disclaimer of coverage for the very insurable accidents for which AMAC contracted. Contrarily, the prior knowledge condition requires an insured to report a mistake as a Wrongful Act if that mistake would "lead a reasonable person in the Insured's position to conclude that a Claim was likely . . ."

Second, AMAC miscontrues the Policy as empowering Evanston to retroactively disclaim coverage by simply finding any mistake and imputing knowledge of that mistake to the insured. Rather, the prior knowledge condition or discovery clause of claims-made professional liability policies such as the Policy here is to provide coverage on a retroactive basis if AMAC had given timely notice of its professional call answering services mistakes:

> to its then existing insurer of the circumstances surrounding AMAC's failure to relay Penny Lynch's messages to Dr. Kaiser, as it was required to do pursuant to the clear Policy language, AMAC would have locked in coverage for the underlying Lynch Action with its prior insurer, and that prior insurer, not Evanston, would be responsible for covering this matter.

Evanston Reply Memorandum of Law at p 5).

Third, it would be inequitable for Evanston to now provide coverage when AMAC failed to comply with its prior insurer's policy's notice and reporting conditions about its 2012 Wrongful Act as well as disclose same on Evanston's insurance coverage application. Fourth, AMAC erroneously requires putting every relevant fact *unknown* to AMAC at the time it committed the Wrongful Act into the analytical equation before applying the subjective/objective test, e.g., facts that its Wrongful Act caused harm. Contrarily, under this two-pronged test, the analytical focus is simply on AMAC's actual knowledge of certain facts[5] before the effective date of the Policy, and a determination whether a reasonable person with knowledge of these facts would believe these facts provide a basis for a claim against AMAC. And, Evanston's own actions in evaluating AMAC's claims for coverage are irrelevant when deciding whether the prior knowledge condition bars coverage. Fifth, Evanston predicated its timely disclaimer of coverage

[5] Indisputably, AMAC knew it received five (5) emergency calls from Ms. Lynch or persons on her behalf for Dr. Kaiser between November 22, and 23, 2012 about her post-surgery symptoms, almost all of these call answering service messages were sent to Dr. Kaiser's outdated beeper number and Dr. Kaiser actually informed AMAC that Ms. Lynch had "suffered a worsening neurological condition . . ." (see Evanston Reply Memorandum of Law at p7, fn.1 [citing to Mueller Opp Aff at ¶12]).

under the Contractual Liability Exclusion provision of the Policy[6] and AMAC has not met its burden in establishing an exception to this exclusion.

At the outset, this court finds the "'unambiguous provision[ ] of . . . [the Policy, i.e., the prior knowledge condition set forth in its Insuring Agreement section] must be given . . . [its] plain and ordinary meaning, and the interpretation of such provision[ ] is a question of law for the court' . . ." (bracketed matter added)(*Vigilant Ins. Co. v Bear Stearns Cos., Inc.*, 10 NY3d 170, 177 [2008]). And, the relevant provision of the Policy should not be deemed ambiguous merely because the parties may interpret them differently (*Universal Am. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 25 NY3d 675, 680 [2015]). Finally, to obtain a declaration of coverage under the Policy, AMAC has the initial burden of demonstrating it has complied with the Policy's relevant condition precedent (*BP Air Conditioning Corp. v One Beacon Ins. Group.*, 33 AD3d 116, 134 [1st Dept 2006]). On the other hand, Evanston has the burden of showing the applicability of the prior knowledge condition and applying the two-pronged, subjective/objective test which would provide a factual basis to disclaim coverage under the Policy.

After reviewing the entire record including the respective Statements of Material Facts against the backdrop of the terms and conditions of the Policy, this court finds the unambiguous prior knowledge condition of the Policy entitled Evanston to disclaim its obligation to defend and/or indemnify AMAC. Evanston met its burden in establishing

[6] Evanston contends that NY Ins. Law §3420[d][2] is not applicable to professional liablility policies to have otherwise required Evanston to notify AMAC of its disclaimer under this Policy exclusion sooner than it did.

that well before the effective date of the Policy, AMAC had prior knowledge of its admittedly negligent wrongful act in performing its professional call answering services rendered to defendants-third party plaintiffs in November 2012 (subjective test), and with actual knowledge of the particular facts comprising its Wrongful Act, a reasonable person in AMAC's position might have expected such particular facts to be the basis of a claim against it (quotations and citations omitted)(*Liberty Ins. Underwriters Inc. v Corpina Piergrossi Overzat & Klar LLP*, 78 AD3d 602, 604-605 [1st Dept 2010]). Moreover, given the undisputed facts of plaintiff's misdirected calls and knowledge of Ms. Lynch's worsening neurological condition from third-party plaintiff, Dr. Kaiser, Ms. Lynch's then treating physician, "it was unreasonable for . . . [AMAC] to have failed to foresee that these facts might form the basis of a claim against . . . [AMAC] . . ." (bracketed matter added and citations omitted). *See, CPA Mut. Ins. Co. of Am. Risk Retention Group v Weiss & Co.*, 80 AD3d 431 (1st Dept 2011). It must also be emphasized that the two-pronged test does not require AMAC to have had knowledge of its professional negligence, i.e., its Wrongful Act was a substantial factor in causing Ms. Lynch's progressively worsening neurological condition.

Compliance with the prior knowledge condition of the Policy is a condition precedent to coverage, and absent any valid excuse for AMAC's non-compliance with this condition precedent, the Policy was vitiated (*Trident Intl. Ltd. v American S.S. Owners Mut. Protection & Indem. Assn., Inc.*, 2008 U.S. Dist. LEXIS 56299 at *15, 2008 WL 2498239 [SDNY] *affd.*, 331 Fed Appx 77 [2d Cir 2009]).

Evanston has also established a second basis for disclaiming coverage under the Contractual Liability Exclusion provision of the Policy when the claim is:

> [b]ased upon or arising out of the liability assumed by the Insured under any contract or agreement; provided, however, this exclusion shall not apply to liability an Insured would have in the absence of the contract or agreement by reason of a Wrongful Act of the Insured in the performance of Specified Professional Services.

As noted earlier (*see* footnote 4, *supra*), defendants/third-party plaintiffs' only remaining claim against AMAC is for contractual indemnification pursuant to the former's agreement with AMAC for professional medical answering services, viz., the sole remaining claim in the 3rd Party Action is solely "based upon and arises out of the liability of . . . [respective defendants/third-party plaintiffs-hospitals] assumed by . . . [AMAC under this agreement] . . ." (Evanston's Memorandum of Law in Support of Cross-Motion at p. 21). In this vein, AMAC cannot rely on the carve-back exclusion to foreclose the applicability of the Contractual Liability Exclusion because AMAC has no liability other than contractual indemnification. Further, AMAC's reliance on Ins. Law §3420(d)(2) to challenge the timeliness of insurer's disclaimer based on this exclusion is misplaced as this statutory provision does not apply to professional liability policies (see, *XL Specialty Ins. Co. v Lakian*, 2015 US Dist LEXIS 8147, *25-26, 2015 WL 273660 [SDNY]), *revd on other grounds* 632 Fed Appx 667 [2d Cir 2015]) ("the plain language of the statute makes clear that it applies only to policies 'insuring against liability for injury to person . . . or against liability for injury to, or destruction of, property'. . .")(*see also*, *Tuls v NY Mar. & Gen. Ins. Co.*, 2016 NY Misc LEXIS 4298, *6-8, 2016 WL 6804964 [Sup Ct, NY County]).

Based on the foregoing, it is hereby

ORDERED that defendant Evanston Insurance Company's cross-motion for summary judgment is granted in its entirety and plaintiff American Medical Alert Corporation's motion for summary judgment is denied in its entirety; and it is further

ADJUDGED and DECLARED that defendant Evanston Insurance Company has no legal obligation to provide a defense to, and provide coverage for, the plaintiff American Medical Alert Corporation in the third party action entitled *Kaiser, et al v. American Medical Alert Corp. d/b/a H-Link Oncall* (*Lynch v. Kaiser, et al*, N.Y. County Index No. 805410/2013); and it is further

ORDERED that a copy of this Decision, Order and Judgment shall be served with Notice of Entry upon all parties within thirty (30) days of the electronic filing of same; and it is further

ORDERED that the complaint is dismissed. The Clerk is directed to enter judgment accordingly.

This constitutes this court's Decision, Order and Judgment.

Dated: New York, New York
May 22, 2019

ENTER:

Hon. Martin Shulman, J.S.C.

FILED
JUN 12 2019
COUNTY CLERK'S OFFICE
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CLERK

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